by which a fund so given can be applied to any charitable purpose, and the trustee named not having any personal interest in it, it must go to the heirs at law or next of kin, as intestate estate.

EDMUND H. BENNETT.

Boston.

RECENT AMERICAN DECISIONS.

Supreme Judicial Court of Maine.

WOODMAN *v.* PITMAN AND OTHERS.

Neither the right of traveling upon the ice of a river affected by the tide, nor the right of taking ice therefrom, is an absolute property right in any person. Both are natural or common rights, belonging to the public at large. Though such rights are theoretically open to all, those persons who first take possession of them are entitled to their enjoyment without interference from others, such rights being the subjects of qualified property by occupation.

Each right is relative or comparative, and, when conflicting with the exercise of the other right, is itself to be exercised reasonably. What would be a reasonable exercise of the one or the other, at any particular place, must depend largely upon the benefits which the people at large are to receive therefrom.

The right of passage over the ice for general travel is not the paramount right at such a place as the Penobscot river at Bangor, and for some distance below, where the great body of the ice is annually harvested for the purposes of domestic and foreign trade; the traveler's privilege at such place being of trifling consequence, compared with other interests conflicting with it, and beset with difficulty and danger during the ice-cutting season.

It is the duty of those who appropriate to their use portions of a public river for ice-fields to so guard their fields, after they have been cut into, as not to expose to danger any persons who may innocently intrude upon them.

Although the defendant may have been in fault in leaving his ice-field unprotected against accident, yet, where the plaintiff's servant, knowing the customs of ice-gatherers, willfully left the usual driven track, and drove over a bank of snow by the side of the defendant's ice-field, knowing that he was going upon an ice-field, and that it was dangerous to do so, he was guilty of contributory negligence, and the plaintiff cannot recover for injuries to his property.

ON motion by defendants from Supreme Judicial Court, Penobscot county.

Action on the case to recover damages to plaintiff's property because of alleged negligence of defendants. The verdict was in favor of the plaintiff, and the defendants filed a motion for new trial. The opinion states the material facts.

C. P. Stetson, for plaintiff.
Wilson & Woodward, for defendants.

PETERS, C. J.—This case largely depends for its solution upon what may be the extent of the right to harvest ice from our large rivers, compared with the conflicting right of traveling upon such rivers during the winter season. This is an interesting topic of inquiry, in view of the importance which ice has lately assumed as a merchantable commodity, and is a branch upon which the law has as yet hardly passed beyond a formative period. The inexhaustible and ever-changing complications in human affairs are constantly presenting new questions and new conditions which the law must provide for as they arise; and the law has expansive and adaptive force enough to respond to the demands thus made of it, not by subverting, but by forming new combinations and making new applications out of its already established principles,—the result produced being only "the new corn that cometh out of the old fields."

Neither of the rights which seem in conflict in the present case, that of harvesting ice and that of traveling upon the ice, is absolute in any person. No one has any absolute property in either. They are derived from a natural right which all have, to enjoy the benefit of the elements, such as air, light, and water, and are common or public rights, which belong to the whole community. In the Roman law they were classified as "imperfect rights." Not that all persons can or do enjoy the boon alike. Much depends upon first appropriation. One man's possession may exclude others from it. Says Blackstone (2 Comm. 14): "These things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterward." They are the subjects of qualified property by occupation: 2 Kent, Comm. 348.

Each right is in theory, speaking generally, relative or comparative. Each recognizes other rights that may come in its way. Each must be exercised reasonably. And what would be a reasonable exercise of the one or the other, at any particular place (for, clearly, there would be a difference in the relative

importance of the different rights in different localities), depends in a large degree upon the benefits which the community derive therefrom. The public wants and necessities are to be considered. The two kinds of franchise belong to the people at large, are owned in common, and the common good of all must have a decisive weight on the question of individual enjoyment.

These, and all other public rights, and the relation that shall subsist between them, when not thereby trenching upon congressional jurisdiction, may be regulated by the legislature. The legislature is the trustee of the public rights for the people. And, as such agent or trustee, the legislature of this State has gone a great way in abridging an individual enjoyment of some of the common rights and privileges possessed by society, when the legislation has presumably inured to the common good. It authorized the changing of the channel of the Saco river, although the effect of the diversion was to impair the value of a good deal of private property (*Spring* v. *Russell*, 7 Me. 273); has allowed private interest to be subserved to the injury of other private interests, by permitting dams and mills to be erected which prevented the flow and ebb of the tide, upon the ground that the public as a whole were to be benefited thereby (*Parker* v. *Cutler Mill-Dam Co.*, 20 Me. 353); has granted to a single individual, the exclusive right of navigating Penobscot river above the tide with steamers, for a period of 20 years, for the consideration of improvements to be made in the navigation of the river by the grantee (*Moor* v. *Veazie*, 31 Me. 360; 32 Id. 343; 14 How. 568). These are illustrations of the legislative power in such matters.

The legislature has the constitutional authority, no doubt, to provide rules regulating the possession and cultivation of the ice-fields upon our navigable rivers, where the tide ebbs and flows, at all events so far as the business is carried on below low-water line, and for the adjustment of conflicting interests which may affect that privilege. If it omits to do so, such matters necessarily become the subjects of judicial interpretation. While the judicial is not co-extensive with the legislative jurisdiction upon the questions, there can be no doubt that it is within the scope of judicial authority to determine the manner in which such public privileges may be best enjoyed by the

public, provided that any judicial regulation which may be attempted shall do no violence to existing law.

The law is subject to slow and gradual growth. A remarkable instance of the development of the law is seen in the doctrine unanimously adopted by the courts in this country that a river may be considered navigable although not affected by a flow of the tides from the sea. The common law was otherwise. Lord Hale, the great publicist, knew no such doctrine. Legislation did not create it. The courts felt obliged to adopt the interpretation, as a new application of an old rule, from an irresistible public necessity. The court of no State has probably ventured so far as this court has in maintaining that small streams have floatable properties belonging to the public use. Our climate and forests, together with the interests and wants of the community make the doctrine here reasonable,—a reasonable interpretation of the law; while in some of the States, where less necessity for the doctrine exists, it is considered by their courts to be untenable, as subversive of private rights. So, in handling the somewhat novel and important questions now pending before us, we are certainly at liberty to construct out of admitted legal principles such reasonable rules as will meet the requirements of the case.

The importance to the public of the ice privileges within the territory before named is incomparably greater than is that of traveling on the ice. Winter river-roads are of much less consequence at the present day than formerly. In the earlier days the natural ways were the only ways for travel, and upon the large ponds and lakes, and upon the rivers in remote places, the same necessity may even now exist. But at Bangor, and for some distance below, the principal area of Penobscot river from which the ice-cuttings have been for some years customarily taken, the public have no need of a way on the ice. The traveler receives much more than an equivalent for any deprivation of the natural passage, in the use of the roads on the banks of the river, at all times kept passable at the public expense. Roads over the ice are rarely suitable and passable,—only occasionally so. The access to them from the shores is difficult, if not dangerous, where the tide, as it does here, ebbs and flows. Permission must be had of the riparian proprietor to cross his

land to enable one to get to the river without being a trespasser. The inconveniences render the privilege nearly, if not quite, worthless. Nor is any considerable use of the river for such purpose proved or suggested. On the other hand, the business of gathering ice for merchantable purposes has assumed extraordinary importance on our rivers. Large amounts of capital are invested. Thousands of men and of teams are employed at a season of the year when other employment cannot be obtained by them. The outlay is mostly in bills for labor, widely circulated. A crop of immense value is annually produced from an exhaustless soil without sowing. The shipping business is materially aided by it. The wealth of the State is greatly increased by it. It is eminently a business of the people. It would seem unreasonable to embarrass such an important enterprise by according to the traveling public a paramount right of passage, when such right, even to its possessor, is scarcely good for anything.

It is an error, we think, to invest the right of passing on the ice in all places with the same degree of importance as that which attaches to the right of vessels in navigable waters. It may be an offshoot of the navigable right,—something akin to it,—but a right of a secondary or inferior degree. The idea of roads over the frozen surface of rivers was never broached in the old common law. It has grown up since, and should be the superior right or not, according to circumstances. We know of only one judicial decision touching the subject,—that in our own State (*French* v. *Camp*, 18 Me. 433), and that does not contradict the views we express in this discussion. There the plaintiff's injury came from the defendant's carelessness in cutting a hole through the ice, and leaving it exposed, upon or near a place where there had been a winter road for more than 20 years. WESTON, C. J., there says: "Assuming that the defendant has as good a right to the use of the water as the plaintiff or the public generally had to the right of passage, the use of a common privilege should be such as may be most beneficial and least injurious to all who have occasion to avail themselves of it." In the present case, it must be remembered, the defendants are not defending themselves as riparian owners, for that would justify their possession only to low-water line, but

as a portion of the public, partaking of a common and public right: *Brastow* v. *Rockport Ice Co.*, 77 Me. 100.

An unlawful obstruction to navigation, being a common nuisance, is remedial by indictment, or by abatement; or a court of equity may take jurisdiction upon an information filed by an attorney-general: Gould, Waters, § 121. It would seem strange to see the ice-harvesters accused of nuisance. But nuisance exists, in lawful business, only where actual injury is sustained. It must be some essential injury and damage. "People living in cities and large towns must submit to some annoyance, to some inconvenience, to some injury and damage; must even yield a portion of their rights to the necessities of business:" Wood, Nuis. 11. In an English case it was said: "Where great works are carried on, which are the means of developing the national wealth, persons must not stand upon extreme rights, and bring actions for every petty annoyance:" *St. Helen Smelting Co.* v. *Tipping*, 11 Jur. (N. S.) 785; reported in 116 E. C. L. 1093. In *Rhodes* v. *Ois*, 33 Ala. 578, a much-quoted case, the test of the floatability of a stream was held to be whether fit for valuable floatage and useful to important public interests. In *Wethersfield* v. *Humphrey*, 20 Conn. 218, it was held that, in order to make a stream navigable, "there must be some commerce and navigation upon it which is essentially valuable." Same decision in *Town of Groton* v. *Hurlburt*, 22 Conn. 178. Navigators must endure inconveniences for the greater general good: *Brown* v. *Town of Preston*, 38 Conn. 219. To constitute a nuisance, the obstructions must *materially* interrupt general navigation: *State* v. *Wilson*, 42 Me. 9. In *Rowe* v. *Granite Bridge Co.*, 21 Pick. 344, 347, SHAW, C. J., said: "But, in order to have this character, it must be navigable to some purpose useful to trade or agriculture." In *Attorney-General* v. *Woods*, 108 Mass. 436, it is said that this language is applied to the capacity of the stream rather than to its uses. But the last was a case where the officers of the commonwealth were endeavoring to prevent an act supposed to injuriously affect the harbor of Boston.

It is our opinion that any occupation of the Penobscot river, within the limits now receiving our attention, for the purpose of a winter-way, would be, at this day, of such insignificant im-

portance, so useless, and valueless, in comparison with other public interests, that it cannot be set up to prevent or abridge the taking of ice within those limits to any extent whatever.

We do not, however, apply the rule stated to any place where a way is commonly used across the river, connecting town or county roads, or where a ferry is established by law: Rev. St. c. 20, § 7. The traveler's right, even if existing theoretically, does not, under the circumstances, assert itself. Reasonable use is practically no use. The same public, possessing both rights, prefer to abandon the use of the one for the much more valuable use of the other.

We are aware that the law, in facilitating the enjoyment of public rights,—and no private right is involved in this controversy,—scans closely the grounds upon which it admits the advantage of one person to be set off against the disadvantage of another. In an early English case (*Rex* v. *Russell*, 6 Barn. & C. 566) an extreme rule was promulgated, in later cases not fully assented to, that staiths erected in the river Tyne should not be regarded as a public nuisance, if the public benefit produced by them countervailed the prejudice done to individuals; the supposed public benefit being that, in consequence of the erections, coals would be brought to the London market in better condition or for lesser price. In subsequent cases it has been maintained that the benefit to be derived from tolerating any impairment of the navigable convenience must be direct, and that the staiths in the Tyne, were a remote and indirect benefit merely, and not computable as a public benefit in the sense of the term in which it should be used when considering the question of nuisance; and it has been explained that the benefit must be a public benefit to the same public; that the same public, or some part of the public, which suffers the inconvenience, must also receive the benefit; that it must be both beneficial and injurious to the public using the same waters.

A satisfactory explanation of the doctrine appears in a discussion by JESSEL, M. R., in *Attorney-Geneval* v. *Terry*, L. R. 9 Ch. 423, where he says: "Then it may be asked, what is the public benefit? In my view it is a benefit of a similar nature, showing that, on a balance of convenience and inconvenience, the public *at that place* not only lose nothing but gain some-

thing by the erection." In that case it was decided that any benefit in the way of gaining trade, to a single individual erecting a wharf in navigable waters, was too remote to be held to be for the advantage of the public generally, when the channel intruded upon was so narrow that every foot of it was wanted for navigation. In the opinion, an illustration of public benefit is given, by supposing the piers of a bridge to be placed in the middle of a navigable river, thereby "to some extent, to a more or less material extent, obstructing the navigation;" but the necessity is great and the injury trifling. In that case, says the opinion, "it would be a benefit that would counterbalance the public injury."

Applying the doctrine as carefully as it is guarded in the cases most widely differing from the case of *Rex* v. *Russell*, above cited, we feel assured that our conclusions are correct in sustaining the contention of the present defendants. Here the ice-gatherer and the traveler belong to the same public; have presumably interests alike; were using the same river,—the same waters,—though in different ways. The ice-takers were occupying the river under the natural right of dipping water therefrom, and it is as if thousands of men were simultaneously exercising the right together. The enterprise directly fosters the interests of navigation on the river. On the other hand, as we have before said, the right of travel, so far as pertaining to the navigation of the river, is, under the circumstances, at most, a secondary, theoretical right, and of no real and essential value. Even private property may be taken for public use by affording compensation. Here, if the traveler is not allowed the use of the river, it is because more than compensation is supplied to him in other roads provided for his use.

We think the trial was conducted upon a too literal application of the principles which govern the use of navigable streams, and that the jury were thereby prejudiced against the defendants to their injury. These views being accepted, it necessarily follows that this portion of the river should be considered as virtually closed during the winter against general traveling. The whole tract cut over must be constantly beset with danger to a traveler who does not keep up an especial acquaintance with the condition of the ice. Besides, the ice-fields, after they have been staked and fenced and scraped, and in some instances

connecting fields extend across the river, have so far become the property of the appropriator that an action would lie against one who disturbs his possession: *People's Ice Co.* v. *The Excelsior*, 44 Mich. 229.

At the same time the appropriators should, by suitable means, reasonably guard their fields against exposing to danger persons who may be likely to innocently intrude upon them, if such likelihood may be seen to exist. It is not necessary, in the present case, to inquire whether the defendants sufficiently observed such caution or not, inasmuch as we are clearly of the belief that the plaintiff's servant in charge of his team was guilty of an act of carelessness which caused the plaintiff's loss. Even if the defendants were in fault, their delinquency would be a prior act, while the servant's was a subsequent, distinct, independent act. The defendants had no reason to suppose the servant would go in the direction he did, or be heedless in his course if he were to go there. As some judge said: "One man is not required to take another man's discretion in his keeping."

At all events, the defendants' act or omission was not negligence against the plaintiff; not an act which the plaintiff can complain of. The idea is clearly expressed in 2 Law Rev. & Quar. J. 507: "The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it." In such case defendants are not even guilty of contributory negligence; that is, their negligence does not, in a legal sense, contribute to it, or participate in it. It is merely a passive agency, or condition or situation through or by which the accident happened; but no part of its real and controlling cause: *O'Brien* v. *McGlinchy*, 68 Me. 552, 557.

The servant was hardly even a traveler on the river, in the ordinary sense of the term. He was himself an operative at the ice-fields. He came with his team upon the ice by crossing defendants' land, striking a traveled way which led upon the ice, along the shore, up to the field of operations he was to engage in. From a freak of his own, instead of keeping the road, as properly he should, he crossed one of defendants' fields, as properly he should not; and, while attempting to go across or around another field of theirs, his team broke through the ice

and was lost. The pretense is set up that the defendants had no fence as a protective barrier at the end of the field extremest from the west bank of the river, to prevent the traveler from going upon the thin ice. None was needed. The exercise of ordinary care by the servant was all that was needed. There was a large ridge of snow and ice at the easterly end of the field, several feet high, thrown up by scraping the field from west to east in preparation for ice-cutting. It seems that the ice was left uncut and solid for a space of twelve or fifteen feet in width inside of the piles or ridge, in order to afford space wide enough for a pair of horses to travel upon while cutting out and handling the cakes of ice. It is a risky track for any horses, but what dangers there are upon the track are incidental to the business. The servant confesses that he was acquainted with the mode of the business; that he knew that the ice had been scraped up to the ridge of snow; knew that there might be holes and thin ice where the field had been scraped; knew that he was going upon the scraped ice; and still he recklessly undertook to conduct his team on the inside of the ridge, when there was an abundance of room to drive safely outside of it. By his carelessness, for which there seems to be no rational explanation, the plaintiff's property was lost.

Motion sustained.

WALTON, DANFORTH, VIRGIN, LIBBEY and FOSTER, JJ., concurred.

HASKELL, J., concurred in the result, but not in the reasoning by which it was reached.

There are not many cases strictly analogous to the principal case. There are, however, many decisions arising out of the business of gathering, manufacturing or selling ice, which we have collated. *French* v. *Camp*, 18 Me. 433, is perhaps the only authority similar to the principal case. It was held in that case, that all have a right to travel on a public river upon the ice and if any one cuts ice upon or near the place where there has been a winter way for twenty years, he is liable to the payment of all damages thereby sustained, by those traveling upon such way, without carelessness or fault on their part. WESTON, C. J., said, "It is a matter of general notoriety, that in all the settled parts of the State, public rivers and streams, not broken by falls or rapids, are traversed up and down, upon the ice, in such well marked and beaten ways as are most convenient for the public. They are not proper subjects for the application of the statute laws provided for the location of public roads or highways: nor are

they susceptible of being governed by the rules and principles by which easements of this kind may be otherwise acquired on land. Yet we do not hesitate to regard them as public rights, so far under legal protection as to entitle a party to a civil remedy, who is wantonly and unnecessarily disturbed by others, while attempting to participate in their enjoyment."

The Right of Gathering Ice from Ponds.—"Great Ponds," in Massachusetts containing more than ten acres, which were not, before the year 1647, appropriated to private persons were by the colony ordinance declared to be subject to common public use. Fishing, fowling, boating, bathing, skating or riding, upon the ice, taking water for domestic or agricultural purposes or for use in the arts, and the cutting and taking of ice, are lawful and free upon these ponds to all persons who own land adjoining them or can obtain access to them without trespass, so far as they do not interfere with the reasonable use of the ponds by others or with the public right, except in cases where the legislature has otherwise directed: *Inhabitants of West Roxbury* v. *Stoddard*, 7 Allen, 158. This right cannot be conveyed, by deed of an owner of land on the shore of the pond, who has acquired no rights against the public in the water of the pond, or in the land under it, by grant from the legislature or by prescription: *Gage* v. *Steinkrauss*, 131 Mass. 222.

In 1841, the owners of all the lands, lying around and bordering upon a great pond, executed, in accordance with an award to which they alone were parties, an indenture containing a recital, that they were "the lawful proprietors in fee simple of all the lands covered by the waters of said pond, and of said waters and all the privileges and appurtenances thereof, in proportion to their respective interests in the margin of said pond;" and by which they mutually agreed to divide "the surface of said pond, and the waters thereof and the land under the same," among themselves in fee, according to certain lines therein defined; and made mutual releases accordingly, with covenants for the quiet enjoyment by each party of the shares and portions of the premises to him so assigned and set out. In 1847 one of these owners made a conveyance of a parcel of land, bordering upon the pond, "excepting and reserving to the grantor, his heirs and assigns, the exclusive right to take ice from said pond, which has heretofore pertained to said parcel of land, according to said indenture;" and the grantee in 1872, conveyed this parcel to the defendant, reserving the same rights to the first grantor. In 1862, the first grantor conveyed to the plaintiff the right so reserved. Since 1839, the proprietors of lands adjoining the pond, had been in the practice of cutting and storing ice for sale. After the indenture, lines were drawn, whenever the pond was frozen, separating each proprietor's privilege from the others, according to the lines defined in the indenture, and the proprietors were accustomed to flood the ice with water in order to increase its thickness, and they conformed to those lines in preparing and cutting ice, and in conveyances which they made of land under the pond. No persons other than those employed by the proprietors, ever came upon the pond to cut ice, and fishermen who occasionally came to cut holes in the ice in order to fish, were not allowed to do so. The whole pond was much frequented by skaters, but it did not appear that they interfered with the ice

cutting in any way. When the pond was not frozen, fishermen and others went to all parts of it in boats. *Held*, that a bill in equity to restrain the defendant from cutting ice on the pond, could not be maintained by the plaintiff, either by virtue of ownership of the shore of the pond, or of title by disseisin, or any covenant, or contract made by or binding upon the defendant, or any restriction imposed upon him or his estate: *Hittinger* v. *Eames*, 121 Mass. 539.

A similar rule exists in Maine. In *Brastow* v. *Rockport Ice Co.*, 77 Me. 100, the right to cut ice on "great ponds," is held to be a public one, in which the riparian proprietors have no greater interest than any one else.

A bill in equity which alleges that the plaintiff is the owner of the right to take ice from a certain portion of a "great pond," within the meaning of the Colonial Ordinance of 1641, respecting such ponds, and of a fishing right therein, and of the outlet thereof, is on demurrer, held to sufficiently state the plaintiff's title to equitable relief, against an unauthorized injury to these rights, and a diversion of water from the outlet: *Tudor* v. *Cambridge Water Works*, 1 Allen, 164.

The owners of the water of a mill-pond own the ice formed upon it, and the riparian proprietors have no right, as owners of the soil, to remove it: *Mill River Woolen Manufacturing Co.* v. *Smith*, 34 Conn. 462.

Where the owner of a mill and the land on one side of the center of the mill-pond, granted a license to an individual to take ice from that portion of the pond, it was held, that the grantee, on complaint that another person was infringing upon his premises, by taking and carrying away ice, although he might maintain an action of trespass, was not entitled to an injunction to restrain the taking of ice: *Marshall* v. *Peters*, 12 How. Pr. 218.

A dam built across an arm of the sea, into which a fresh-water creek empties, to exclude the salt water, for the purpose of creating a fresh-water pond, upon which to cultivate and harvest ice for the market, without direct authority of the legislature, or the delegated action of harbor commissioners, if the case falls within their jurisdiction, is in the same sense, a public nuisance as would be a solid wall built across a street: *Dyer* v. *Curtis*, 72 Maine, 181.

A deed of a tide mill privilege, mill dam, wharf privilege and the right to flow the creek and adjoining lands to high-water mark, "and all the rights and highways connected with and belonging to said mill privilege," gives the grantee no right to ice cutting, nor title to the ice formed upon a fresh-water pond, raised by changing the dam so as to exclude the salt water: *Dyer* v. *Curtis*, 72 Maine, 181.

Where ice, valuable as an article of commerce, was removed without license, by cutting from a pool formed by a dam in a stream not navigable, by a person owning the land opposite the place where the ice was cut, but the portion of the pool from which the ice was removed, was over the land of another, it was held, that this was a trespass under § 14, 2 G. & H. 462, which provides that any person who, without a license from competent authority, shall remove from the lands of another, any tree, stone, timber or other valuable articles, shall be guilty of a trespass: *State* v. *Pottmeyer*, 33 Ind. 402.

Right to take Ice from Canals.—The legislature of the State of Indiana authorized its public agents to appropriate a fee simple in the lands taken for the construction of its canals. *Held*,

that the former owner had no right to take ice from the canal: *Water Works Co. of Indianapolis* v. *Burkhart et al.*, 41 Ind. 364.

The board of trustees of the Wabash & Erie Canal made an agreement with A. and others, partners under the name of Wabash & Erie Canal Company, transferring for a special time and upon special conditions (which were performed), all the tolls and revenues to be derived, or which might accrue from the use of the canal. *Held*, that the company was as much entitled to the ice which formed in the canal, and to the proceeds thereof, as it was to the tolls and water rents: *Cromie* v. *Wabash & Erie Canal Trustees*, 71 Ind. 208.

In constructing the White Water Valley Canal, a large pond, producing ice on low lands adjoining and beyond the canal, was formed by the flow of water from the canal, the lands covered by which pond had been used by the State and its grantee, the canal company, only for the purpose of overflow. The plaintiff was the grantee of the "canal and its appurtenances." *Held*, that only the right to overflow, and not the land overflowed itself, was appurtenant to the canal, and the right to gather ice upon the pond did not belong to the plaintiff, but to the owner of the soil, subject to the condition that no injury should be done to the easement of the plaintiff, and that the quantity of water should not be materially lessened: *Brookville & Metamora Hydraulic Co.* v. *Butler*, 91 Ind. 134.

A contrary opinion was held in *Card* v. *McCaleb*, 69 Ill. 314. Neither the Act of 1871, nor that of April 7, 1872, relating to the Illinois & Michigan Canal gives any specific authority, or contains any grant of power, from which any authority in the commissioners can be inferred, to sell or lease the right to take the ice that may form in any portion of the canal. There is nothing in either of the Acts of 1871 or 1872, relating to this canal, which is inconsistent with, or which by implication repeals the privilege, given in the Act of 1869, to all persons resident upon the line of the canal, to cut and remove ice from the same, its feeders, side cuts and basins, free of charge. See also *Edgerton* v. *Huff*, 26 Ind. 35.

Right of Riparian Owners to take Ice from Rivers.—In *Lorman* v. *Benson*, 8 Mich. 18, it was *held*, that the owner of the bank was entitled to every beneficial use of the soil under the river, which could be exercised with a due regard to the public easement, and any trespass which interfered with such use, like an obstruction preventing the taking of ice, gave him a right of action for the damages thereby occasioned.

The owner of land bordering on a stream, where the tide does not ebb and flow, owns the bed of the stream to the center, if his land is on one side of the stream only, or for the entire width, if it is on both sides, and he has the sole right to take ice formed upon the stream opposite his land. Neither is it a defense to an ice company, taking such ice for the purpose of selling it, that it is an obstruction to navigation: *Washing Ice Co.* v. *Shortall*, 101 Ill. 46.

When the water of a flowing stream, running in its natural channel, is congealed, the ice attached to the soil constitutes a part of the land and belongs to the owner of the bed of the stream, who has the right to prevent its removal: *State* v. *Pottmeyer*, 33 Ind. 402; *Lorman* v. *Benson*, 8 Mich. 18; *Seeley* v. *Brush*, 35 Conn. 419.

A street bounded on one side on a navigable stream above high-water mark, extends to the center of the

stream in the absence of a contrary intention. And the adjacent lot owners are entitled to the ice formed on that portion of the stream: *Brooklyn* v. *Smith*, 104 Ill. 429.

However, in *Hickey* v. *Hazard*, 3 Mo. App. 480, it was *held*, that where one had surveyed and marked off ice unappropriated by another, upon a navigable river, and had expended money to preserve it, and make it valuable for use, and as a commercial commodity, such person had a possession sufficient to support an action of trespass; and in *Wood* v. *Fowler*, 26 Kan. 682, the court held that a riparian owner had no ownership in the ice, forming on a navigable stream. In the absence of legislation, one first appropriating the ice is entitled to it.

A lessee of riparian rights may inclose and store ice for his own use and profit, within the limits embraced in his lease, if he does not thereby interfere with the right of navigation, or with the proper use of the stream by other people: *People's Ice Co.* v. *The Excelsior*, 44 Mich. 229.

D. M. MICKEY.

Supreme Judicial Court of Massachusetts.

DALAY *v.* RICE ET AL.

If a landlord lets premises abutting upon a way, which are, from their condition or construction, dangerous to persons lawfully using the way, he is liable to such persons for injuries suffered thereupon, although the premises are occupied by a tenant, unless the tenant has agreed with his landlord to put the premises in proper repair.

The fact that the tenant is also liable, affords the landlord no defense.

TORT by Winnifred Dalay against Margaret Rice, executrix, and Henry W. Savage, for personal injuries suffered by falling into a coal-hole in the sidewalk in front of No. 10 Wall street, Boston, to which said coal-hole was appurtenant. Prior to the trial the plaintiff discontinued against defendant Rice, executrix. At the trial in the superior court for Suffolk county, before MASON, J., it was admitted that Wall street then was, and for many years had been, a public street; that said premises were conveyed to defendant Savage, November 3, 1883, by virtue of a power of sale contained in a mortgage of said premises for the purpose of foreclosing said mortgage; and that said premises were conveyed (subject to said mortgage) to Daniel Breslin, April 20, 1875; and that he occupied the same from that date till after this accident; and that he quitclaimed said premises to defendant Savage, November 9, 1883; and that Savage was the owner of the premises at the time of the accident. Breslin testified that he remained at a rent of $41.67 per month; that